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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES CLYDE BROCK,

Defendant and Appellant.

C061986

(Super. Ct. No. 08NCR06468)

Defendant James Clyde Brock appeals the sentence imposed following his plea of guilty to possession of methamphetamine. He contends the trial court imposed an unauthorized sentence when it ordered him to take part in drug court and to serve 180 days in jail, rather than sentencing him to Proposition 36 probation. The People properly concede. We shall remand for resentencing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

While executing a search warrant for Raoul Ortega, Glenn County Narcotics Interagency Task Force officers found defendant James Clyde Brock in the bathroom with Ortega, flushing baggies

of methamphetamine down the toilet. Ortega indicated defendant was at the apartment to purchase methamphetamine.

Defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and attempting to destroy evidence. (Pen. Code, § 135.)¹ As to the possession count, it was further alleged defendant had served a prior prison term. (§ 667.5.) Defendant pled no contest to possession of methamphetamine, and the people dismissed the destruction of evidence charge and the prior prison term allegation.

The matter came on for sentencing and the parties agreed defendant should be granted probation and sent to adult felony drug court. The probation report recommended defendant be sentenced to state prison for the aggravated term of three years. Defendant had two prior convictions for being under the influence of a controlled substance and one prior conviction for transportation of a controlled substance. He had been granted Proposition 36 probation in each of those cases. The court noted defendant had previously attended Proposition 36 drug treatment and failed. Defendant indicated he had successfully completed Proposition 36 treatment once.

After some discussion, the court accepted the arguments of defense counsel and the district attorney. Defendant was not granted Proposition 36 probation. He was granted probation,

¹ Further undesignated statutory references are to the Penal Code.

required to enroll in and complete felony drug court, and serve 180 days in county jail.

DISCUSSION

Defendant contends the trial court imposed an unauthorized sentence by sentencing him to drug court, rather than Proposition 36 probation. The People concede.

Under the statutes, "any person convicted of a nonviolent drug possession offense shall receive probation." (§ 1210.1, subd. (a).)² However, this subdivision does not apply where, as here, a defendant has "two separate convictions for nonviolent drug possession offenses, has participated in two separate courses of drug treatment pursuant to subdivision (a), and is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment Notwithstanding any other provision of law, the trial court shall sentence that defendant to 30 days in jail." (§ 1210.1, subd. (b)(5).)

Thus, as relevant here, if the trial court had made a finding by clear and convincing evidence that defendant was not amenable to any form of drug treatment, he was not entitled to Proposition 36 probation. Absent such a finding, defendant was entitled to Proposition 36 treatment.

Here, the trial court did not make an explicit finding that defendant was unamenable to drug treatment. Nor can we find

² Proposition 36 overrides a sentencing court's traditional discretion. (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1399, citing *People v. Murillo* (2002) 102 Cal.App.4th 1414, 1421.)

such a finding to have been implicitly made, based on the trial court's decision to reinstate defendant on probation "subject to serving local time and participating in a[] [court] drug treatment program. 'It makes no sense for the court to order continued treatment if the court believed [the defendant] was unamenable.' (*In re Taylor, supra*, 105 Cal.App.4th at p. 1399.) As in *Taylor*, the trial court's decision to reinstate [defendant] on probation with drug treatment" (*People v. Dagostino* (2004) 117 Cal.App.4th 974, 995) refutes any claim that the trial court found defendant unamenable to "any and all forms of available drug treatment." (§ 1210, subd. (b)(5).) In the absence of such a finding, defendant was entitled to be sentenced under the Proposition 36 sentencing scheme. Accordingly, we conclude the sentence imposed by the trial court was unauthorized.

DISPOSITION

The sentence imposed in this case is vacated and the matter remanded for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

HULL, J.